

² 5 U.S.C. § 8101 *et seq.*

(FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

ISSUE

The issues are: (1) whether appellant has met her burden of proof to establish a traumatic injury in the performance of duty on July 26, 2019, as alleged; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On November 26, 2019 appellant, then a 68-year-old claims assistant, filed a traumatic injury claim (Form CA-1) alleging that on July 26, 2019 at 1:05 p.m. she sustained an injury while in the performance of duty. She explained that she stepped off of an elevator that was several inches above floor level and landed hard on her feet, causing her to experience pain in her lower back, legs, and right buttock; muscle weakness in her right leg; a tingling sensation in her left arm and fingers; and back stiffness. On the reverse side of the claim form the employing establishment acknowledged that appellant was in the performance of duty when her injury occurred. It also indicated that its knowledge of the facts concerning her injury comported with the statement she provided. Appellant did not stop work.

In a development letter dated December 30, 2019, OWCP informed appellant of the deficiencies of her claim. It advised her of the type of factual and medical evidence necessary to establish her claim and provided a questionnaire for her completion. OWCP afforded appellant 30 days to provide the necessary information.

In a January 28, 2020 medical report, Dr. Eric Weisbrot, Board-certified in family medicine, evaluated appellant for back pain she had experienced for over six months. He recounted that her symptoms began on July 26, 2019 at work when she stepped off of an elevator that had stopped higher than the actual floor. Appellant's foot fell approximately 6 to 12 inches and she landed hard on her right leg. She asserted that she experienced immediate pain in her lower back and that she sent an e-mail to her supervisor in order to inform him that she injured herself due to the issue with the elevator. Appellant continued working until her condition deteriorated and she visited her doctor in November 2019. A subsequent November 7, 2019 magnetic resonance imaging (MRI) scan of her lumbar spine revealed multiple degenerative changes with disc bulges at L2-3 and L3-4, which caused neural foraminal encroachment and L3-4 anterolisthesis. At that point, appellant requested to file an injury claim with her supervisors. Dr. Weisbrot reviewed appellant's history of injury, including a 1976 back injury caused by a slip and fall. On evaluation he diagnosed a sprain of the ligaments of the lumbar spine, other intervertebral disc degeneration of the lumbar spine, lumbar intervertebral disc disorder with

³ The Board notes that, following the December 9, 2020 decision, OWCP received additional evidence on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

radiculopathy and a low back strain. Dr. Weisbrot opined, within a reasonable degree of medical certainty, that appellant's conditions were causally related to her claimed July 26, 2019 employment injury.

In an attached narrative medical report, Dr. Weisbrot opined that the July 26, 2019 employment incident directly caused appellant's injury. He explained that, when she stepped off of the elevator and her leg fell approximately 6 to 12 inches, the resulting impact sent a shock up her leg and into her back. Because appellant was unaware the elevator stopped so high, she was unprepared to step down, which left her muscles unprepared for the drop. The unexpected drop caused her back to move and twist in an uncontrolled manner. Dr. Weisbrot explained that the sudden movement caused the various muscles of appellant's back and body to quickly tighten as a reflex. When the sudden jolt and impact was added to her tightened muscles, it caused her already-tightened lower back muscles and tendons to strain and her ligaments to sprain. Dr. Weisbrot further explained that, when appellant landed hard on her right leg, it would have caused an axial compression of the lumbar discs and joints, as the force of the weight of her body were transmitted up her right leg and into her lumbar discs to absorb the pressure. These compressive forces would have irritated her lumbar discs and caused them to bulge while also irritating and inflating the joints, resulting in neuritis/neuropathy or radiculitis/radiculopathy. Dr. Weisbrot indicated that the November 7, 2019 MRI scan of her lumbar spine confirmed these opinions. He reasoned that, although the July 26, 2019 employment incident did not cause her degenerative changes, the fact that it was present would have caused a greater chance in her developing the injuries that she did. Dr. Weisbrot explained that the presence of degenerative changes demonstrated that appellant's ligaments were not as strong as healthy ligaments and changed the mechanics of her joint, making her more susceptible to further injury. Using this reasoning, he opined that the July 26, 2019 employment incident also exacerbated her degenerative spinal condition. Dr. Weisbrot further explained that the degenerative damage to appellant's lumbar spine did not initially cause pain and that once the effected joints were irritated she began to experience her symptoms.

By decision dated February 3, 2020, OWCP accepted that the July 26, 2019 employment incident occurred as alleged, but denied appellant's claim, finding that the medical evidence of record was insufficient to establish causal relationship between her diagnosed lumbar conditions and the accepted July 26, 2019 employment incident.

On February 11, 2020 appellant, through her representative, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

In a February 24, 2020 response to OWCP's development questionnaire, appellant recounted the events of the July 26, 2019 employment incident, indicating that she stepped off of the elevator while it was approximately one to two feet above the floor level and experienced pain in her lower back after she came down hard on her feet. She then immediately e-mailed her supervisor to inform him of her injury. Appellant explained that she waited for his response until she was given a Form CA-1 by the employing establishment on November 25, 2019. She then described her subsequent medical treatment and asserted that she did not have any similar disabilities or symptoms prior to her injury.

On February 26, 2020 Dr. Dimitrios Kostopoulos, a physical therapist, performed an electromyography (EMG) scan, demonstrating evidence of chronic axonal pathology affecting the S1 nerve root level bilaterally.

In medical reports dated from February 25 to May 20, 2020, Dr. Weisbrot indicated that appellant had been attending physical therapy to treat symptoms related to her lumbar conditions. On examination he diagnosed a sprain of the ligaments of the lumbar spine, other intervertebral disc degeneration of the lumbar spine, lumbar intervertebral disc disorder with radiculopathy, and a low back strain. Dr. Weisbrot recommended that appellant continue her physical therapy treatment.

In a telephonic hearing held on June 2, 2020, appellant explained the events of the July 26, 2019 employment incident where she injured her back after stepping off of an elevator and dropping approximately one to two feet. She testified that, following her injury, she immediately e-mailed her supervisor to inform him of what had occurred. Appellant then recounted her subsequent history of treatment and periodic use of leave. She indicated that she had previously injured her back 20 years prior and that injury had resolved after a week or two of treatment. Appellant asserted that she had no other injuries prior to the accepted July 26, 2019 employment incident. She also noted that the reason she did not stop work was because she would not have been paid for the days she missed and that the reason she did not receive medical treatment until January 2020 was because she was waiting for her supervisor to respond so that she could have a better idea of what she was supposed to do.

In a June 3, 2020 narrative medical report, Dr. Weisbrot provided an update of appellant's condition and again opined that her lumbar conditions were caused by the accepted July 26, 2019 employment incident in which she stepped off an elevator and dropped approximately one to two feet. He indicated that she underwent a February 26, 2020 EMG scan that found evidence of a chronic axonal pathology affecting the S1 nerve root bilaterally. Dr. Weisbrot concluded that this finding was evidence that appellant's nerve was irritated and caused her radiculopathy. He further included a copy of his initial January 28, 2020 narrative report.

By decision dated July 15, 2020, OWCP's hearing representative affirmed, as modified, the February 3, 2020 decision, finding that the evidence of record was insufficient to establish that the injury and/or events occurred as appellant described. He noted that she delayed several months in seeking medical attention and providing written notice to the employing establishment, continued to work, and failed to provide a consistent history of the employment injury. The hearing representative concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

OWCP continued to receive evidence. In medical reports dated June 17 to September 9, 2020, Dr. Weisbrot diagnosed a sprain of the ligaments of the lumbar spine, other intervertebral disc degeneration of the lumbar spine, lumbar intervertebral disc disorder with radiculopathy and a low back strain. He recommended that appellant continue physical therapy treatment.

On December 6, 2020 appellant, through her representative, requested reconsideration of OWCP's July 15, 2020 decision.

Appellant attached a November 30, 2020 letter wherein she again explained the events of the alleged July 26, 2019 employment incident in which an elevator stopped short of floor level and caused her to land hard on two feet. She clarified that she erroneously provided the incorrect wording for the height where the elevator stopped and asked that her updated description of the incident be considered instead of the one she initially submitted.

By decision dated December 9, 2020, OWCP denied appellant's request for reconsideration of the merits of her claim, finding that the evidence submitted was insufficient to warrant review of its July 15, 2020 decision.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA⁴ has the burden of proof to establish the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation period of FECA,⁵ that an injury was sustained in the performance of duty, as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.⁶ These are the essential elements of each and every compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁷

To determine whether a federal employee has sustained a traumatic injury in the performance of duty it must first be determined whether fact of injury has been established.⁸ Fact of injury consists of two components that must be considered in conjunction with one another. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place, and in the manner alleged.⁹ Second, the employee must submit sufficient evidence to establish that the employment incident caused a personal injury.¹⁰

An injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury in the performance of duty, but the employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of

⁴ *Supra* note 2.

⁵ *J.P.*, Docket No. 19-0129 (issued April 26, 2019); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁶ *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁷ *R.R.*, Docket No. 19-0048 (issued April 25, 2019); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

⁸ *E.M.*, Docket No. 18-1599 (issued March 7, 2019); *T.H.*, 59 ECAB 388, 393-94 (2008).

⁹ *L.T.*, Docket No. 18-1603 (issued February 21, 2019); *Elaine Pendleton*, 40 ECAB 1143 (1989).

¹⁰ *B.M.*, Docket No. 17-0796 (issued July 5, 2018); *John J. Carlone*, 41 ECAB 354 (1989).

action.¹¹ The employee has not met his or her burden of proof to establish the occurrence of an injury when there are inconsistencies in the evidence that cast serious doubt upon the validity of the claim. Such circumstances as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury, and failure to obtain medical treatment may, if otherwise unexplained, cast sufficient doubt on an employee's statements in determining whether a *prima facie* case has been established.¹² An employee's statements alleging that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence.¹³

ANALYSIS -- ISSUE 1

The Board finds that appellant has met her burden of proof to establish an employment incident in the performance of duty on July 26, 2019, as alleged.

The evidence of record consistently indicates, on July 26, 2019, appellant exited an elevator which, unbeknownst to her, had stopped above floor level, causing her to step down hard on her feet. Appellant asserted that, immediately following the July 26, 2019 employment incident, she sent an e-mail to her supervisor informing him of the incident and her resulting injury. The employing establishment acknowledged that appellant was in the performance of duty when her injury occurred. It also indicated that its knowledge of the facts concerning appellant's injury comported with the statement she provided. Further, the history of the employment incident as reported by Dr. Weisbrot was consistent with appellant's account. The injuries appellant claimed are consistent with the facts and circumstances she set forth, her course of action, and the medical evidence she submitted. The Board, thus, finds that appellant has met her burden of proof to establish an employment incident in the performance of duty on July 26, 2019, as alleged.

As appellant has established that the July 26, 2019 employment incident occurred as alleged, the question becomes whether this incident caused a personal injury.¹⁴ Thus, the Board will set aside OWCP's July 15, 2020 decision and remand the case for consideration of the medical evidence. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision addressing whether appellant has met her burden of proof to establish causal relationship.¹⁵

CONCLUSION

The Board finds that appellant has met her burden of proof to establish an employment incident in the performance of duty on July 26, 2019, as alleged.

¹¹ *M.F.*, Docket No. 18-1162 (issued April 9, 2019); *Charles B. Ward*, 38 ECAB 667, 67-71 (1987).

¹² *Betty J. Smith*, 54 ECAB 174 (2002); *L.D.*, Docket No. 16-0199 (issued March 8, 2016).

¹³ *See M.C.*, Docket No. 18-1278 (issued March 7, 2019); *D.B.*, 58 ECAB 464, 466-67 (2007).

¹⁴ *See B.S.*, Docket No. 19-0524 (issued August 8, 2019); *Willie J. Clements*, 43 ECAB 244 (1991).

¹⁵ In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the July 15, 2020 decision of the Office of Workers' Compensation Programs is reversed. The December 9, 2020 decision is set aside as moot. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 11, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board